Supreme Court, U.S.
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No. 96-1539

In The

Supreme Court of the United States

October Term, 1996

LOON MOUNTAIN RECREATION CORPORATION,

Petitioner,

vs.

ROLAND C. DUBOIS AND RESTORE: THE NORTH WOODS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the discharge of river water containing chemical and biological pollutants to a pristine pond require a permit under the Clean Water Act?

2. Did the Forest Service violate NEPA by failing to consider project alternatives and mitigation measures to avoid degradation of a pristine pond, and by failing to obtain public comment on the ski area development alternative selected in its Record of Decision?

LIST OF PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the caption, the parties to the proceedings include the United States Department of Agriculture and the following officers thereof who were sued in their official capacity: Daniel Glickman, Secretary, U.S. Department of Agriculture; Mike Domdeck, Chief, U.S. Forest Service; Robert Jacobs, Regional Forester, Eastern Region, U.S. Forest Service; and Donna Hepp, Forest Supervisor, White Mountain National Forest, U.S. Forest Service.

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16 U.S.C. § 497(b) 1

33 U.S.C. § 1251 *et seq.* 1

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STATUTES AND REGULATIONS INVOLVED

Excerpts of the relevant statutes and regulations appear in petitioner's Appendices D and E.

STATEMENT OF THE CASE

A. Statement of Facts.[1]

The White Mountain National Forest ("WMNF") is managed by the United States Forest Service ("Forest Service") for a wide range of competing public uses, including skiing. 16 U.S.C. § 497(b). The Forest Service issues "special use" permits authorizing private entities to provide recreational activities such as skiing on national forest land. 36 C.F.R. §§ 251.50-.65. The Forest Service must abide by federal environmental laws including the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.*, and the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, in issuing such permits.

Loon Pond is 65 feet deep and is located in the WMNF at an elevation of 2,400 feet. Pet. App. 4a; 102 F.3d at 1277. It is unusual for its pristine nature. *Id.* Regulations issued by the New Hampshire Department of Environmental Services designate Loon Pond as a Class A waterbody, protected by demanding water quality standards, *see* N.H. Code Admin. R. Env-Ws 432.03, and as an

[1] This statement of facts is largely drawn from the opinion of the United States Court of Appeals for the First Circuit at Pet. App. 3a-9a; 102 F.3d 1273, 1277-80.

Outstanding Resource Water, protected against any measurable long-term degradation, *see id.* 437.06; 40 C.F.R. § 131.12(a)(3); *Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992). It ranks in the upper 95th percentile of all lakes and ponds in northern New England for low levels of phosphorus, resulting in exceptionally high water clarity. Pet. App. 4a; 102 F.3d at 1277. The Pond supports a rich variety of life in its ecosystem, including aquatic organisms not found elsewhere in New England. *Id.*; Court of Appeals Joint Appendix ("J.A."), vol. 1 at 514-15. Loon Pond also constitutes a major source of drinking water for the Town of Lincoln. Pet. App. 4a; 102 F.3d at 1277. There is virtually no human activity on the land draining into Loon Pond, except skiing at the nearby Loon Mountain Ski Area. *Id.*

Petitioner Loon Mountain Recreation Corporation ("Loon Corp.") has operated the Loon Mountain Ski Area since the 1960's. Pet. App. 4a; 102 F.3d at 1278. Prior to the permit revision that gave rise to this litigation, Loon Corp. held a special use permit to operate on 785 acres of WMNF land. *Id.* Although not specifically authorized by the Forest Service to do so, Loon Corp. drew water for snowmaking from Loon Pond, the East Branch of the Pemigewasset River ("East Branch"), and Boyle Brook. *See id.* Beginning in 1974, Loon Corp. was authorized by the Town of Lincoln to remove the top 18 inches of water from Loon Pond for use in snowmaking. Pet. App. 4a-5a; 102 F.3d at 1278. This agreement was amended in 1988 to allow for authorization of further withdrawals on a case-by-case basis. Pet. App. 5a; 102 F.3d at 1278. Combined

uses by Lincoln and Loon Corp. during the period covered by these agreements typically caused four-to six-foot fluctuations in the level of Loon Pond. *Id.*

Loon Corp. has also used Loon Pond as a repository for water and pollutants discharged from the snowmaking system. *Id.* These discharges have included water originating from the East Branch, Boyle Brook, and Loon Pond. *Id.* Approximately 250,000 gallons of East Branch water have been transferred to Loon Pond each year in this manner. *Id.* Water taken from the East Branch and discharged to Loon Pond contains bacteria, other aquatic organisms such as Giardia lambia, phosphorus, turbidity and heat. *Id.* Evidence was also introduced in district court that oil and grease were present in the discharge water, although their origin was disputed. *Id.*

In 1986, Loon Corp. applied to the Forest Service for an amendment to its special use permit to allow ski area expansion onto additional WMNF lands. Pet. App. 5a-6a; 102 F.3d at 1278. Pursuant to NEPA, the Forest Service developed a Draft Environmental Impact Statement ("EIS"), and a supplement to the Draft EIS. Responding to criticism of the adequacy of those documents, the Forest Service issued a Revised Draft EIS, which was published for public comment. The Revised Draft EIS set forth five alternatives to meet the perceived demand for additional alpine skiing. Pet. App. 6a; 102 F.3d at 1278. All five alternatives were located at the Loon Mountain site. *Id.*

Many individuals and groups, including respondent Dubois, filed comments describing environmental problems with the alternative plans for ski area expansion.

One lengthy comment from the U.S. Environmental Protection Agency suggested that the Forest Service proposed to "use Loon Pond like a cistern" instead of treating it with the care it deserved as "one of the rare high altitude ponds of its size in the White Mountains." *Id.*; J.A. vol. 2, Resp. to Pub. Com. on RDEIS at A-78. Other commenters suggested that Loon Corp. be required to build artificial water storage ponds to replace Loon Pond as a source of water for snowmaking and as a disposal site for pollutants from the snowmaking system. Pet. App. 6a; 102 F.3d at 1278.

During the EIS process, Ron Buso, a hydrologist for the WMNF, expressed concern that the proposed drawdown of Loon Pond by twenty feet was likely to have severe environmental impacts. Pet. App. 6a-7a; 102 F.3d at 1279. He explained that natural snowmelt in New Hampshire is extremely acidic and that a substantial amount of acidic snowmelt would remain in Loon Pond as a result of the drawdown, making the Pond two to three times more acidic than it would otherwise be. Pet. App. 7a; 102 F.3d at 1279. According to Mr. Buso and a number of scientists whose affidavits were submitted to the district court, this increase in the Pond's acidity would change the chemistry of the Pond, cause toxic metals to be released from the sediment, and kill naturally occurring organisms. *Id.*

Without addressing the issues raised by Mr. Buso or in the comments suggesting artificial storage ponds, the Forest Service prepared a Final EIS. *Id.* The Final EIS added a sixth alternative, also on the Loon Mountain site, which the Forest Service identified as its preferred alternative. *Id.* The new alternative provided for expansion of

Loon Corp.'s permit area by 581 acres, for the construction of one new lift and upgrading of several others, and for the construction of approximately 70 acres of new ski trails. *Id.* These changes were designed to increase the number of skiers accommodated at the area from 5,800 skiers per day to 9,000. *Id.* Under Alternative 6, Loon Corp. would more than double the amount of water used for snowmaking, from 67 million gallons per year to 138 million gallons. *Id.* Most of the additional water would be drawn from Loon Pond. *Id.* Loon Corp. would be authorized to draw the Pond down for snowmaking by fifteen feet, compared to the current eighteen inches. *Id.* The Forest service assumed that the Town of Lincoln would need up to an additional five feet of Pond water, making a total of twenty feet that the Pond was expected to be drawn down each year. Pet. App. 7a-8a; 102 F.3d at 1279. This draw down would remove approximately 63% of the Pond's water. Pet. App. 8a; 102 F.3d at 1279. In March 1993, the Forest Service published a Record of Decision ("ROD") adopting Alternative 6. *Id.*

As a mitigation measure for the adverse environmental impacts on Loon Pond, the Forest Service required Loon Corp. to pump water from the East Branch to Loon Pond in December and May of each year if the Pond was not otherwise full at those times. *Id.* These transfers of river water to Loon Pond would be in addition to increased discharges to the Pond resulting from the planned expanded snowmaking operations. In its Final EIS, the Forest Service recognized that the East Branch is a relatively unprotected Class B waterway under New Hampshire law, and that transfer of East Branch water to Loon Pond would introduce pollutants into the Pond. *Id.*

Accordingly, it specified that this transfer of East Branch water could not occur if it exceeded certain levels of turbidity, bacteria, or oil and grease. *Id.* Neither the Final EIS nor the ROD set any limits, however, on the level of non-bacterial organisms such as Giardia lambia or on pollutants such as phosphorus and heat that may be present in the transferred water. *Id.* Nor did the Final EIS indicate an alternative means of refilling Loon Pond – with clean water – if conditions were such that the transfer of East Branch water would exceed the specified levels of pollutants. *Id.*

B. Course of Proceedings.

Administrative appeals of the ROD were filed by the National Audubon Society, Sierra Club, RESTORE: The North Woods, Lincoln Coalition of Concerned Citizens, Preserve Appalachian Wilderness, Pemigewasset River Council, and Roland C. Dubois. These appeals were denied. *See* J.A. vol. 1 at 201, 493-94.

Thereafter, respondent Roland C. Dubois ("Dubois") filed a complaint challenging the Forest Service action in the United States District Court for the District of Columbia. Docket Entry ("DOC") 1. The matter was transferred to the District of New Hampshire. *Id.* Dubois then amended his complaint to include a claim that the Forest Service violated the CWA by allowing the unpermitted discharge of pollutants from the East Branch to Loon Pond during snowmaking activities. DOC 8. Both RESTORE: The North Woods ("RESTORE") and Loon Corp. intervened. DOC 9, 13, 19, 19-1. Dubois then again

amended his complaint to include Loon Corp. as a defendant also responsible for violating the CWA by transferring East Branch water to Loon Pond without a CWA permit. DOC 52.

Dubois filed motions for a Temporary Restraining Order and a Preliminary Injunction in district court, DOC 12, which were denied. DOC 41, 53. Thereafter, Dubois, RESTORE and the Forest Service each filed motions for summary judgment, DOC 31, 33, 46, 47, 502, 54, 56, 57, while Loon Corp. filed a motion to dismiss. DOC 26. The District Court granted the Forest Service motion, and denied all others. Pet. App. 102a.

On appeal, the United States Court of Appeals for the First Circuit partially reversed the District Court's decision, ruling that a CWA permit is needed to transfer water and pollutants from the East Branch to Loon Pond, that the Forest Service arbitrarily failed to consider reasonable alternatives to the use of Loon Pond for snowmaking, and that the Forest Service failed to provide an opportunity for public comment on the approved ski area expansion alternative. Pet. App. 1a-59a.

The Forest Service and Loon Corp. filed motions for rehearing, and Dubois filed a conditional motion for rehearing. On February 13, 1997, the Court of Appeals granted in part the Forest Service's motion (by incorporating into its opinion certain technical amendments not relevant here), denied Loon Corp.'s motion, and did not address Dubois' motion. Pet. App. 60a-61a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS DID NOT DECIDE THAT A CWA PERMIT IS REQUIRED FOR THE RETURN OF POLLUTANTS TO THE SAME BODY OF WATER FROM WHICH THEY WERE REMOVED.

Petitioner Loon Corp. would have this Court review a matter specifically *not* decided by the Court of Appeals: whether the return of water and associated pollutants to the *same* waterbody from which they were removed requires a CWA permit even if nothing is added to the water in the interim. Pet. at 9-13. The Court of Appeals explicitly states in its opinion that its holding on CWA permit issues is limited to situations where water and associated pollutants are transferred from one water body *to another*. The Court wrote:

> We hold that the Pemigewasset River and Loon Pond are two distinct "waters of the United States," and that the proposed transfer of water from one to the other constitutes an "addition." Where, as is undisputed here, the discharge is through a point source and the intake water contains pollutants, [a CWA] NPDES permit is required. The Forest Service's determination to the contrary was arbitrary and capricious and not in accordance with law. [citations omitted]

Pet. App. 53a; 102 F.3d at 1299. Thus, the Court's holding does not address the issue of the return of water and associated pollutants to the same waterbody from which they were withdrawn. Indeed, the Court distinguished this case from others involving such activity:

> The Forest Service is simply wrong to analogize the present situation to a dam that merely accumulates the *same* water, *see National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982), or a pump storage facility that stores water from one source in a different place, *see National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 589-90 (6th Cir. 1988), *as distinguished from moving different water from one flowing water body into another stationary, colder body.*

Id. (Emphasis added.)

Thus, this case does not present the question which petitioner asks the Court to review.

II. A CWA PERMIT IS REQUIRED FOR THE TRANSFER OF WATER AND POLLUTANTS FROM ONE BODY OF WATER TO ANOTHER DISTINCT BODY OF WATER.

Loon Corp. argues that the CWA's prohibition on the unpermitted discharge of pollutants through a point source, 33 U.S.C. § 1311(a), does not apply when the pollutants in question are transferred from one body of water to another wholly distinct waterbody. Pet. at 13-16. Loon Corp.'s approach would, for example, allow the unregulated transfer of water and associated pollutants from waters bearing heavy loads of industrial pollutants into pristine waters that have been protected from direct

industrial discharges because of their exceptional ecological significance or importance as municipal water supplies. This cannot be reconciled with the CWA's goals of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and would render useless the billions of dollars that have been invested nationwide in attaining waterbody-specific water quality standards through the control of point source pollution.

Two courts other than the First Circuit have specifically addressed whether the transfer through pipes of water and associated pollutants from one waterbody to a distinct water body requires a CWA permit. Both courts reached the same result as the First Circuit – a CWA permit is required. *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (permit needed for operation of a culvert allowing water and pollutants from a pond to enter a hydrologically distinct wetland); *Del-AWARE Unltd., Inc. v. Pennsylvania DER*, 508 A.2d 348 (Pa. 1986) (permit needed for movement through a pipe of water and pollutants from the Delaware River to a high-elevation creek).

Petitioner's reference to *Bettis v. Town of Ontario*, 800 F. Supp. 1113 (W.D.N.Y. 1992), is not persuasive. Pet. at 14. *Bettis* addressed the diversion of an entire stream to another location where no other body of water existed. *Id.* at 1119. The Court held that a CWA permit was not required for such activity, specifically noting that "there is no indication that any pollutants were discharged either into the stream or *from the stream into another body of water.*" *Id.* (Emphasis added.)

Equally strained is petitioner's reliance on *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), which has been overturned by the Fourth Circuit. In *Appalachian Power* the Court held that pollutants which were present in a facility's intake water could not thereafter be subject to limitations in a CWA permit when returned to a water of the United States, because the industrial facility did not itself "add" the pollutants to the water body. *Id.* at 1377. The Fourth Circuit has now abandoned this reasoning. In *West Virginia Coal Association v. Reilly*, ERC (BNA) 1353, 1991 U.S. App. LEXIS 9401 (4th Cir. 1991), the Fourth Circuit upheld a district court determination that holding ponds associated with coal mining operations are "waters of the United States" under the CWA, and that permits are required to authorize the discharge of pollutants from such ponds into other waters of the United States. *Id.* at LEXIS *4, *13. Similarly, in *U.S. v. Law*, 979 F.2d 977 (4th Cir. 1992), the Fourth Circuit held that pollutants released from a point source into a water of the United States must be regulated by a CWA permit, even if the pollutants originated off the property of the discharger. *Id.* at 979. Thus, *Appalachian Power* is no longer controlling even in the Fourth Circuit. This is not simply respondent's view – the United States Environmental Protection Agency has reached the same conclusion and has stated that it follows the approach reflected in subsequent Fourth Circuit decisions. J.A. vol. 1 at 278.

There is no split in the Circuits on the need for a CWA permit when pollutants are transferred from a water of the United States to a distinct water body. It

follows that petitioner's statements regarding discrepancy in treatment of ski areas in different locations in the country are demonstrably wrong. Petitioner's specific example, that ski areas in New York and Vermont are subject to different treatment than those in New Hampshire, Maine and Massachusetts, Pet. at 15, is particularly difficult to comprehend in light of petitioner's own recognition, Pet. at 14, that the Second Circuit reached the same conclusion in *Dague* as the First Circuit did in this case.[2]

III. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO CONSIDER REASONABLE PROJECT ALTERNATIVES AND MITIGATION MEASURES TO AVOID DEGRADATION OF LOON POND, AND BY FAILING TO OBTAIN PUBLIC COMMENT ON THE DEVELOPMENT ALTERNATIVE SELECTED.

The issues raised by petitioner regarding the adequacy of the Forest Service EIS are highly fact-specific and, because petitioner's motion for stay of the Court of Appeals mandate was denied, likely to be rendered moot

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[2] Loon Corp. mischaracterizes the facts as well as the law. It claims that it does not use water withdrawn from the East Branch before it is discharged to Loon Pond. Pet. at 7. However, the record demonstrates, and the Court of Appeals specifically noted, that Loon Corp. uses East Branch water before it is discharged to Loon Pond to pressurize its snowmaking system and to keep its pipes from freezing. Pet. App. 5a n.3. Loon Corp. also alleges that it does not add any materials to the East Branch water that passes through its pipes and is discharged to Loon Pond. Pet. App. at 7. Evidence in the record suggests otherwise. *See* Pet. App. 47a n.29; 102 F.3d at 1296; J.A. vol. 1 at 256, 337.

through issuance of a revised Forest Service EIS before this Court would have an opportunity to address them. Moreover, petitioner has identified no fundamental legal question underlying these challenges that would warrant this Court's consideration.

Although Loon Corp. itself describes water use and discharge issues as "critical" to the Loon Mountain expansion project, Pet. at 22, it argues that studying feasible alternatives to the use of Loon Pond as the principle source of water for snowmaking can only be criticized as a failure to study "mitigation" as opposed to a failure to study reasonable alternatives.[3] Pet. at 17-18. This is nonsense. An alternative with less environmental impacts than other alternatives is not automatically converted into a mitigation measure for the other alternatives, as Loon Corp. argues. Rather, where a fundamental modification is identified for a critical project element, it clearly represents an "alternative" to the proposed action. The record demonstrates that the Forest Service has required the construction of even larger snowmaking ponds at other ski areas than would be required to eliminate the use of Loon Pond for snowmaking purposes at the Loon Mountain Ski Area. Pet. App. 28a-29a; 102 F.3d at 1288. Public commenters, including respondent Dubois, specifically requested that the Forest Service consider construction of artificial ponds at the Loon Mountain site. Pet. App. 27a-28a, 32a-35a; 102 F.3d at 1288,

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[3] Loon Corp. is procedurally foreclosed from making this argument now, since neither it nor the Forest Service asserted it in any of the proceedings below.

1290-91. Therefore, the Court of Appeals correctly determined that the alternative should have been studied in the Final EIS.

Loon Corp. also claims that the Forest Service was under no obligation to study mitigation measures to protect Loon Pond because allowing the annual removal of 63% of the water in Loon Pond, and its replenishment with acidic snowmelt and low-quality river water, would cause no impact whatsoever to the Pond. Pet. at 17-19. This argument is not only counter-intuitive, but is also thoroughly contradicted by expert opinion in the administrative record. The United States Environmental Protection Agency stated in comments on the Revised Draft EIS that the proposal would "use Loon Pond like a cistern" instead of treating it with the care it deserves because "it is acknowledged to be one of the rare high altitude ponds of its size in the White Mountains." Pet. App. 6a; 102 F.3d at 1278; J.A. vol. 2, Resp. to Pub. Com. on RDEIS at A-78. Again in its comments on the Final EIS the Environmental Protection Agency stated that it "objects to the proposed drawdown of the pond," in part because "the likelihood of frequent substantial drawdowns and the proposed refilling of Loon Pond with significant quantities of water from the East Branch subjects the Pond to threats, acknowledged in the EIS, from non-point sources of pollution." J.A. vol. 1 at 194-95. These concerns of the Environmental Protection Agency were substantiated by the Forest Service's own hydrologist, Ron Buso, who warned that the planned use of Loon Pond was likely to greatly increase its acidity. Pet. App. 7a; 102 F.3d at 1279. The record clearly reflects, and the Court of Appeals correctly determined, that the planned use of Loon Pond would

likely cause severe environmental impacts. The Forest Service was obliged under NEPA to study all reasonable mitigation measures for these impacts, including the construction and use of artificial water storage ponds to minimize or eliminate the use of Loon Pond for snowmaking purposes. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989).

In view of NEPA's public participation requirements, the Court of Appeals also correctly ruled that the Forest Service must prepare a Supplemental EIS. Pet. App. 36a-39a; 102 F.3d at 1291-93. The Revised Draft EIS that the Forest Service released for public comment set forth five development alternatives, differing by location of trails, amount and location of water to be used for snowmaking, mitigation measures, and size and location of facilities associated with skiing. The location and size of ski trails is one of the critical components of the project, since the trails take up by far most of the land needed for the development and, therefore, are a major determinant of its aesthetic and environmental impacts. (E.g., through wetland fills and destruction of critical wildlife habitat.)

The Forest Service did not ultimately select one of the five alternatives described in the Revised Draft EIS, but instead authorized construction of a new Alternative 6 that was first described in the Final EIS. Virtually all of the trails in Alternative 6 are in substantially different locations than those of *any* of the five alternatives set forth in the Revised Draft EIS. Pet. App. 38a; 102 F.3d at 1292-93.

One particularly different aspect of Alternative 6 from other alternatives is the crowding of many new

trails within the area of the WMNF historically authorized for Loon Corp.'s use. *Id.* In the Revised Draft EIS the Forest Service had indicated that crowding more trails in this area was not feasible. Pet. App. 39a; 102 F.3d at 1293; J.A. vol. 1 at 145-46. Thus, Loon Corp.'s argument that Alternative 6 "was within the range of alternatives the public could have reasonably anticipated [the agency] to be considering," Pet. at 23-24, is clearly meritless.

Loon Corp. also seriously misstates the facts when it claims that "on the critical issues of water-withdrawal and discharge . . . Alternative 6 presented no new issues." Pet. at 20, 22. First, as the Court of Appeals noted, Alternative 6 envisioned more water use for snowmaking than *any* of the other alternatives. Pet. App. 39a; 102 F.3d at 1293. The Environmental Protection Agency, among others, expressed surprise and dismay at the amount of water required for snowmaking under Alternative 6. J.A. vol. 1 at 193.

In addition, Alternative 6 is the only alternative that envisions substantial expansion of the ski area onto South Mountain but *does not* provide for the construction of a one-acre snowmaking pond to mitigate water withdrawals from Loon Pond and to receive the wastewater discharges from the snowmaking system. J.A. vol. 1 at 167-68 (alt. 2), 174 (alt. 3), 179-80 (alt. 4); J.A. vol. 2, ROD at 17 (alt. 6). Thus, on both water withdrawal and discharge issues, Alternative 6 is substantially different from the alternatives made available for public comment. The Court of Appeals correctly determined that a Supplemental EIS should have been prepared.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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